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## Comments

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## Comments

### FUTURE INTERESTS—MISSOURI LAW OF LIMITATIONS TO THE GRANTOR'S OR DEVISOR'S HEIRS

Where there was a limitation to the heirs of a grantor or devisor under the common law, the courts held that that limitation was of no effect to give an estate to heirs by purchase, and that there was a reversion in the grantor himself.<sup>1</sup> This resulted in the heirs of the grantor or devisor taking, if at all, by inheritance rather than by purchase. The interest of the heirs was no greater than a bare expectancy subject to defeasance by the ancestor's disposition of the property before his death. This rule is commonly referred to as the rule in *Bingham's Case*,<sup>2</sup> having taken its name from the case title of one of the earliest English cases applying the doctrine.<sup>3</sup>

The foundation for the doctrine's application under our present system of property law is generally conceded by writers and courts to be based upon historical reasons which are nonexistent at the present time.<sup>4</sup> One of the primary bases for the original creation of the rule is the feudal law of primogeniture. Courts used the rule in *Bingham's Case* as an effective means of preserving the overlord's feudal incidents of wardship and marriage.<sup>5</sup> As a result of the extirpation of feudalism and the feudalistic incidents appertaining thereto, the doctrine lost its basic support. Another reason under the common law for the rule was that devisees were not liable for the debts of the devisor, not even for specialty debts,<sup>6</sup> unless the realty was expressly charged with the payment of debts by the will of the testator.<sup>7</sup> However, a decedent's intestate property was subject to the payment of his debts. The rule in *Bingham's Case* permitted the decedent's creditors to proceed against his realty even though he purported to pass some interest to his heirs by will, thus avoiding the common law restrictions in the case of devisee. The decedent's heirs were held to take by inheritance, if at all, as it was said: "A devise to the heir at law is void, if it gives precisely the same estate that the heir would take by descent if the particular devise to him was omitted out of the will."<sup>8</sup> In view of modern law subjecting all of a decedent's property to the payment of his debts before devisees are permitted to take, the historical basis for the protection of a decedent's creditors

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1. *Ellis v. Page*, 7 Cush. 161 (Mass. 1851).
  2. 2 Co. Rep. 91a (K. B. 1600).
  3. The historical development of the doctrine has been dealt with by Harper and Heckel, *The Doctrine of Worthier Title* (1930), 24 ILL. L. REV. 627.
  4. Harper and Heckel, *supra* note 3; 1 SIMES, FUTURE INTERESTS (1936) §§ 144, 145.
  5. *Ibid.*
  6. *Plasket v. Beeby*, 4 East 485 (K. B. 1804).
  7. *Greene v. Greene*, 4 Madd. 148 (Ch. 1819).
  8. 4 KENT, COMMENTARIES 506.

has been nullified. Another purported reason offered by courts as a basis for the rule has been that it serves as a means of preserving family pride, for a title derived by descent is a worthier title than one acquired by purchase. This also accounts for its present descriptive reference of "worthier title" as employed by courts and writers. This was not an original reason advanced for the creation of the doctrine, but was rather a rationalization of the rule by courts when petitioned to invoke the doctrine in an appropriate case.

Irrespective of modern reason or necessity, the doctrine of worthier title is a well established common law principle of property and future interest law.<sup>9</sup> Under the early common law conception of the doctrine it was a positive rule of law which often had the effect of defeating the grantor's or deviser's intent, rather than a rebuttable rule of construction to aid in the determination of that intent. In England by virtue of its statutory abrogation,<sup>10</sup> the doctrine of worthier title has no application either as a positive rule or as a rule of construction. American courts have not followed the doctrine in its strictest application as a positive rule of law but have generally accorded it the status of a rule of construction.<sup>11</sup> The rule of construction deducible from American decisions is that where the heir of the grantor or deviser would take the same quality and quantity of estate by descent as he would take by purchase, if the particular limitation were omitted from the instrument, the heir is held to take by descent the worthier title. American courts have not repudiated the doctrine by judicial decision, save in one or two cases of doubtful authority.<sup>12</sup>

Due to the superficial similarity of the factual situations wherein the doctrine of worthier title and the rule in *Shelley's Case*<sup>13</sup> are applicable, the two situations must be distinguished. This note deals with the type situation where *A* grants or devises to *B* for life, then to the heirs of *A*. The rule in *Shelley's Case* concerns the situation where *A* grants or devises to *B* for life, then to the heirs of *B*. Though the two rules are distinct, courts often confuse them in their application.<sup>14</sup> Under the English common law, the rule in *Shelley's Case* was followed as a positive rule of law.<sup>15</sup> American courts have generally accorded the rule in *Shelley's Case* the effect of a positive rule of law which almost always defeats the intent of the grantor or deviser.<sup>16</sup> Statutes abrogating the rule in *Shelley's Case* have no effect

9. *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221 (1919); *Akers v. Clark*, 184 Ill. 136, 56 N. E. 296 (1900); *Whitney v. Whitney*, 14 Mass. 88 (1817); *Parsons v. Winslow*, 16 Mass. 361 (1820); *Ellis v. Page*, 7 Cush. 161 (Mass. 1851).

10. Inheritance Act, 1833, 3 & 4 Wm. IV, c. 106, § 3.

11. *Bowditch v. Jordan*, 131 Mass. 321 (1881); *Dooley v. Goodwin*, 93 S. W. 47 (Ky. 1906); *Hammond v. Chemung Canal Trust Co.*, 141 N. Y. Misc. 158, 252 N. Y. Supp. 259 (1931); *Gray v. Union Trust Co.*, 171 Cal. 637, 154 Pac. 306 (1915); *Lawrence v. Lawrence*, 181 Ill. 248, 54 N. E. 918 (1899); see *Doctor v. Hughes*, 225 N. Y. 305, 311, 122 N. E. 221, 222 (1919); *Whittemore v. Equitable Trust Co.*, 250 N. Y. 298, 165 N. E. 454 (1929).

12. *In re Merritt*, 94 N. Y. Misc. 425, 159 N. Y. Supp. 558 (1916); *Sands v. Old Colony Trust Co.*, 195 Mass. 575 (1907).

13. 1 Co. Rep. 93b (K. B. 1581).

14. *Loring v. Eliot*, 82 Mass. 568 (1860).

15. *Jesson v. Wright*, 2 Bligh 1 (H. L. 1820).

16. *Hudson v. Hudson*, 287 Ill. 286, 122 N. E. 497 (1919); *Hicks v. Deemer*,

on the application of the doctrine of worthier title.<sup>17</sup> Missouri has a statute abolishing the rule in *Shelley's Case* in regard to limitations in deeds.<sup>18</sup> The Missouri statute purporting to abolish the rule of *Shelley's Case* in its application to wills is curiously drawn, and perhaps from a literal interpretation fails in its purpose.<sup>19</sup>

Due to the scanty judicial construction of the doctrine of worthier title in Missouri cases, this note attempts to review not only those cases where the application of the doctrine was directly in-issue, but also those cases wherein the facts would have warranted an analysis of the doctrine's applicability had the issue been raised. Following a chronological order, the case of *Tevis v. Tevis*<sup>20</sup> presents this factual situation: A devised blackacre to B for life of X, with the right in B to purchase said land, and then the money or land to heirs of body of X, or if none, to A's heirs at law. B, the plaintiff, elected to purchase the land, and seeks to secure the title and his share of purchase money, claiming to come within the meaning of A's heirs at law, as X died without bodily issue. C, D, E, F are residuary legatees or devisees who together with B constitute A's heirs at law. The court construed the limitation to A's heirs at law as creating in B, and in the residuary legatees, C, D, E, F, a remainder contingent on surviving the termination of life estate. Although F survived A, he died prior to the termination of B's life estate, hence the surviving members of the class took the entire interest. Assuming this construction to be proper, there would be no occasion for the application of the doctrine of worthier title as the "heirs at law" of A did not refer to legal heirs of A at the time of his natural death, but rather to those persons who were A's heirs had A died at the termination of B's life estate. Although there was no issue raised as to an application of the doctrine of worthier title, had the court invoked the doctrine, B would have taken no share of the purchase money and the residuary legatees would have acquired the entire interest. If the devise to the heirs at law of A was void, A would have retained the reversionary interest, which would have passed under the residuary clause of his will. However, this case held that where a testator devises to his heirs at law intending that they be determined as a class at a time other than his death, that intent will be given effect.

In the case of *Wells v. Kuhn*,<sup>21</sup> A conveyed blackacre to B for life, then to A, but if A predeceases B, then to descend and vest in heirs of A. Subsequently A conveyed all of his interest to B. A predeceased B and the collateral heirs of A seek to set aside the second deed on the theory that A had nothing left to convey by the second deed, as his first deed passed a life estate to B and contingent remainder in fee to the heirs of A.<sup>22</sup> The court construed the words "heirs at law

187 Ill. 164, 58 N. E. 252 (1900); Kirby v. Broadus, 94 Kan. 48, 145 Pac. 875 (1915).

17. *Mayes v. Kuykendall*, 112 S. W. 673 (Ky. 1908).

18. MO. REV. STAT. (1929) § 3110.

19. MO. REV. STAT. (1929) § 562.

20. 259 Mo. 19, 167 S. W. 1003 (1914).

21. 221 S. W. 19 (Mo. 1920).

22. Had this construction of the limitation been adopted by the court the result contended for by the heirs of A would not necessarily have followed.

of A" as words of *limitation* and not of *purchase*, and held that A retained the reversion in fee, and his heirs, if they take, must take by descent.<sup>23</sup> The parties claiming through B took the entire interest. The court did not employ the theory of the doctrine of worthier title, but adopted the construction of the word "heirs" as laid down in *Garrett v. Wiltse*,<sup>24</sup> asseverating that "Undoubtedly the words 'and heirs' may be used in deeds and wills in the sense of sons, daughters and children, etc., that is, as words of purchase, when the context demands such construction, but the burden is thrown upon him who contends they are words of purchase to rebut the presumption that they are used as words of limitation, i.e., as intended to mean not individuals but quantity of estate and descent, which in a fixed legal sense they import, and the intent not to use the words in their legal and fixed sense must be unequivocal and not to be misunderstood." By inference the court purports to follow the rule that where there is a limitation in favor of the heirs of the grantor, the court will presume, in the absence of any contrary intent of grantor being shown, the words are not used as words of purchase indicating a particular class to take under the instrument, but rather as words of limitation describing the quality of the preceding estate limited. Factually, however, it was unnecessary for the court to invoke this rule of construction. The instrument displayed the grantor's intent clearly and unequivocally, that being, that the land "shall descend and vest in his heirs." The language clearly indicates that the heirs were to acquire title by descent, if at all. The cardinal principle in the interpretation of deeds is that the intent of the grantor shall be the governing factor. Courts do not invoke rules of construction as distinguished from rules of interpretation<sup>25</sup> unless the intention of the grantor is unknown and undiscoverable. The *dictum* of the court to the effect that the heirs of the grantor are presumed to take by descent rather than by purchase, in the absence of any contrary intent of the grantor being shown, is in accord with the general weight of authority in the United States as to the application of the doctrine of worthier title.<sup>26</sup>

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The grantor would have retained a reversionary interest after the creation of the contingent remainder. The issue that would have squarely arisen would have been whether or not the Missouri courts would adhere to the common law principles of destructibility of contingent remainders. If we assume that the court would have followed those principles, then, the reversionary interest and the next vested interest having come together in the same person, the two interests would merge and swallow up the particular estate. There being no particular estate to support the contingent remainder, it would be destroyed. The ultimate result of the case would have been the same.

23. A related problem, though not within the doctrine of worthier title, may arise from a factual situation wherein A conveys to B for life, then to B's children, but if none, then to A and his heirs. *Hobbs v. Yeager*, 263 S. W. 225 (Mo. 1924); *Keller v. Keller*, 92 S. W. (2d) 157 (Mo. 1936). Courts generally hold that A has expressly retained a defeasible reversionary interest after the contingent remainder.

24. 252 Mo. 699, 710, 161 S. W. 694 (1913). The issue raised in this case as to the construction of the word "heirs" was entirely unrelated to the doctrine of worthier title. The problem raised was whether "heirs" was used to describe the quality of the estate the grantee acquired or was used to create an interest in the heirs of the grantee by purchase.

25. ATKINSON, WILLS (1937) § 265.

26. See note 11, *supra*.

The reasons, meritorious or otherwise, for the application of the doctrine of worthier title have no foundation in cases involving personalty.<sup>27</sup> Personal property was never held in feudal tenure, so that any necessity for the invocation of the doctrine to protect feudal rights of an overlord was nonexistent. The creditors of the decedent have always been able to proceed against the decedent's personalty, whether it was bequeathed or inherited. Under common law principles personalty passed to the next of kin and did not pass by descent.<sup>28</sup> Nevertheless, some American courts have misconstrued the scope of the doctrine's application and have failed to restrict its application to cases involving realty.<sup>29</sup>

In *Gardner v. Vanlandingham*,<sup>30</sup> A bequeathed the residue of his estate to B for life, then to A's heirs, but if any die, his share to go to his issue. A had five heirs, C, D, E, F, G, living at his death. Between the date of A's death and B's death C and D had died. Plaintiffs claimed through C and D. E, F and G had acquired possession of the residue of the estate, which consisted entirely of personalty. As defendants, they contended that they had acquired the entire interest as the remainder created in A's heirs was contingent on surviving B. The court adopted the plaintiffs construction of the limitation that the heirs' interest vested at the death of A. The remaining limitation created a contingent executory interest which would divest the title of such of these remaindermen who should die with issue prior to the death of B. Since neither C or D died with issue, the court held that their interest could not be divested, and their vested interests were transmitted to their legal representatives. There was no contention raised that the heirs of A took by descent rather than by purchase, though the application of the rule would have changed the ultimate result. By statute in Missouri,<sup>31</sup> a widow takes a child's share of personalty if her husband dies intestate and with children. Had the property gone by descent, A's widow would have taken a share, and the distribution would have been made in sixths rather than in fifths. Although the issue was not raised, the result (as distinguished from the reasoning) of this case is authority, when the appropriate case arises, for the holding that the doctrine of worthier title does not apply to cases involving personalty.

In *Fullerton v. Fullerton*,<sup>32</sup> A in his will created a trust fund to consist of \$2,000 with the additional sum that may be derived from the sale of lands that he owned. The trustee was directed to loan the fund on ample real estate security, the interest to be paid annually to B for life, then the principal to go to B's children, but in case B dies without children surviving him, then the principal to go to A's heirs. The will created a life estate in B, and alternative contingent remainders in B's surviving children and in A's heirs, and a reversion in A's estate. As the will was not set out in its entirety, we may only speculate as to whom the reversionary interest passed. If the will contained a residuary clause, the re-

27. *Ellis v. Page*, 7 Cush. 161 (Mass. 1851); *Biedler v. Biedler*, 87 Va. 300 (1891) *semble*.

28. ATKINSON, WILLS (1937) §§ 7, 8.

29. See *Kellett v. Shepard*, 139 Ill. 433 (1891).

30. 334 Mo. 1054, 69 S. W. (2d) 947 (1934).

31. MO. REV. STAT. (1929) § 323.

32. 132 Mo. 504 (1905) *semble*.

version would have passed to the residuary legatees. Conversely, if there were no residuary clause, the reversionary interest was acquired by A's next of kin.

There was no contention raised for the application of the doctrine of worthier title to the purported remainder created in the heirs of A. Even those courts which apply the doctrine of worthier title in cases dealing with personalty must limit its operation to wills or deeds in which the testator or grantor purports to create a remainder *in his next of kin*. A limited the remainder to his "heirs," and if A intended to create a remainder in his strict heirs, there could be no application of the doctrine of worthier title, as those who comprise the class of A's heirs are not the same persons as those who constitute the class of A's next of kin. If it can be construed that the testator meant "next of kin" when he used "heirs," then the issue arises whether the doctrine of worthier title should apply.<sup>33</sup> If the doctrine of worthier title had been applied giving A a reversion instead of creating a remainder in A's heirs, when B died without issue him surviving, this reversion would have fallen into the residuary clause, or if none, would have passed to A's next of kin.

The court said in the principal case that ". . . the remainder would descend to the heirs . . ." of A.<sup>34</sup> Though the ultimate result is certainly justified, the court's language that the heirs took a remainder by descent is inconsistent in theory. If the heirs acquired a remainder, they would take that interest *by purchase*. If they acquired an interest *by descent*, they are not taking a remainder, but rather a reversion from the testator. If the court really means the heirs took by *descent*, the court must have unconsciously applied the doctrine of worthier title to personalty. For the heirs to take by descent, the will would have to be without a residuary clause, as pointed out above. In any event, the precise holding of the case is consistent with the previous decision of the court in *Gardner v. Vanlandingham*.

In the recent case of *Norman v. Horton*,<sup>35</sup> A conveyed to B for life, remainder to heirs of the body of B, but if none survive B, then to the heirs of A. Defendants contended that the future interest given to the heirs of A was a reversionary interest, invoking the doctrine of worthier title, but if a remainder were created, it vested on the death of A. Either construction of the limitation that the defendants contended for would have given the same ultimate result. In adopting the plaintiffs contention that the interest of A's "heirs" was a remainder contingent on their surviving B's death, the court followed the same construction of the limitation to the testator's heirs as did the court in *Tevis v. Tevis*. If A's heirs were to be determined as though A had died immediately after B, there would be no occasion for the application of the doctrine of worthier title, for the

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33. Intestate personal property is distributed to a man's "next of kin." Intestate real estate descends to "heirs." It is not uncommon, however, for laymen and lawyers to speak loosely of personal property being distributed to "heirs." Hence when a testator bequeathes personalty to "heirs," courts often construe those words to mean "next of kin." *McCormick v. Sanford*, 318 Ill. 544, 149 N. E. 476 (1925); *Jacobs v. Prescott*, 102 Me. 63, 65 Atl. 761 (1906); *Lawrence v. Crane*, 158 Mass. 392, 33 N. E. 605 (1893). 2 SIMES, FUTURE INTERESTS (1936) § 420.

34. Italics added.

35. 136 S. W. (2d) 187 (Mo., 1939).

interest would be limited to an entirely different group of persons than those who would take by descent from A. The court rejected the defendants' contention for the application of the doctrine of worthier title which would prevent the "heirs" from taking as remaindermen by way of purchase. The court said that in Missouri "heirs" may take as purchasers on the authority of *Eckle v. Ryland*.<sup>36</sup> However, *Eckle v. Ryland* had no relation to the application of the doctrine of worthier title, but was a case involving the use of the words "or heirs" in the creation of a contingent remainder, and the issue resolved itself into the question of whether the words "or heirs" were used to describe the quality of the estate of the contingent remainderman, or whether the words were used to create an alternative contingent remainder in the heirs of the contingent remainderman. A holding that a limitation to legal heirs of a remainderman is effective to create an estate by way of purchase, is no authority that a limitation to the legal heirs of a grantor is equally effective to create or transfer an estate by way of purchase. *Eckle v. Ryland* can lend no support to the *dictum* in the principal case that the doctrine of worthier title is not part of the common law of Missouri.

The court in the course of its opinion, adopting the language of the annotator to the case of *Akers v. Clark*,<sup>37</sup> asserted that the reasons for the doctrine being no longer in existence there would seem to be no justification for the persistence of American courts in adhering to the doctrine. This *dictum* leaves us with a reasonable doubt as to whether the Missouri Supreme Court will by judicial decision, if the appropriate case arises, repudiate the doctrine as a rule of law, which defeats intent, and give it the effect only of a rule of construction to be used in the absence of other intent, or to completely reject the doctrine even as a rule of construction. In view of the fact that the majority of American courts accord the doctrine of worthier title the effect of a rule of construction,<sup>38</sup> it is submitted that the Missouri courts may follow that line of authority and its own *dicta*.

However, the well advised lawyer should draw his limitations to carry out his client's intent on the assumption that the doctrine of worthier title is still a rule of law in Missouri, in order to avoid the possibility of litigation. Although the word "heirs" has a fixed legal meaning, it has, nevertheless, been the subject of judicial construction in numerous suits.<sup>39</sup> The obvious difficulty of using a word of such a polysemantic character should be another reason for lawyers to avoid its careless use in drawing instruments for their clients. A limitation to "heirs" as purchasers is usually a thought-saving device to avoid determining more precisely the ultimate distribution of the property, and every legitimate wish of a client can be better effectuated by an intelligent lawyer without resorting to an end limitation to the grantor's or testator's heirs.

SIMON POLSKY

36. 256 Mo. 424, 165 S. W. 1035 (1914).

37. 75 Am. St. Rep. 152, 184 Ill. 136, 56 N. E. 296 (1900).

38. See note 11, *supra*.

39. Simes, Knouff, Leonard, *The Meaning of "Heirs" in Wills—A Suggestion in Legal Method* (1935) 31 Mich. L. Rev. 956.



## ACTS OF GOVERNMENT AS AFFECTING LANDLORD AND TENANT RELATIONSHIP

Not infrequently government regulations cause problems to arise, which as far as possible should be anticipated in drafting leases, particularly long-term leases. Many changes in the use of the property may become necessary under the powers of the state and local authority. Land may be needed for the public use, the premises may become unsafe or unsanitary, the government may requisition the use of the premises, under the police power of the state certain restrictions may be necessary or alterations and improvements may be ordered. Usually the parties assume the continuation of present conditions and regulations. Many vexatious problems may be prevented by some consideration of these matters before the lease is executed. It is proposed to inquire into the effect of such regulations upon the landlord-tenant relationship.

*Condemnation Under Eminent Domain*

If all of the leased premises is condemned, Missouri and most of the courts take the position that the relationship of landlord-tenant is terminated and the obligation to pay rent suspended.<sup>1</sup> A few courts hold that the proceeding has no effect whatever on the obligations under the lease and that the tenant remains liable for the whole rent.<sup>2</sup> Where part of the leased premises is condemned by eminent domain proceedings there is a great difference in the holdings of the cases. Many cases hold that such a proceeding has no effect on the landlord-tenant relationship and the tenant remains liable for the whole rent.<sup>3</sup> Where a part of the leased premises is condemned, Missouri has taken the position that the taking dissolves the relationship of landlord-tenant *pro tanto*, and the rent accruing subsequently is reduced in proportion to the amount taken.<sup>4</sup> Many other states have adopted the same view either by judicial decision<sup>5</sup> or by force of statutes.<sup>6</sup>

The public, upon condemnation of the land, must pay as compensation the present value of the property, which is to be distributed between the landlord

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1. *Stubbings v. Evanston*, 136 Ill. 37, 26 N. E. 577 (1891); *Corrigan v. Chicago*, 144 Ill. 537, 33 N. E. 746 (1893); *Emmes v. Feeley*, 132 Mass. 346 (1882); *Devine v. Lord*, 175 Mass. 384, 56 N. E. 570 (1900); *Goodyear Shoe Machinery Co. v. Boston Terminal Co.*, 176 Mass. 115, 57 N. E. 214 (1900); *Savin Hill Yacht Club Ass'n v. Savin Hill Yacht Club*, 246 Mass. 75, 140 N. E. 299 (1923); *Biddle v. Hussman*, 23 Mo. 597 (1856); *Barclay v. Pickles*, 38 Mo. 143 (1866); *Hudson County v. Emmerich*, 57 N. J. Eq. 535, 42 Atl. 107 (1898); *Uhler v. Cowen*, 199 Pa. 316, 49 Atl. 77 (1901); *Note* (1926) 43 A. L. R. 1176.

2. *Foot v. Cincinnati*, 11 Ohio 408 (1842).

3. See a collection of the cases in (1926) 43 A. L. R. 1176, (1928) 53 A. L. R. 686.

4. *Biddle v. Hussman*, 23 Mo. 597 (1856); *Kingsland v. Clark*, 24 Mo. 24 (1856); *Note* (1935) 98 A. L. R. 254.

5. *Levee Com'rs v. Johnson*, 66 Miss. 248, 6 So. 199 (1889); *Cuthbert v. Kuhn*, 3 Whart. 357 (Pa. 1838).

6. *David v. Beelman*, 5 La. Ann. 545 (1850); *United Cigar Stores Co. v. Norwood*, 124 Misc. 488, 208 N. Y. Supp. 420 (Sup. Ct. 1925); *McCardell v. Miller*, 23 R. I. 96, 46 Atl. 1345 (1900).

and tenant according to their respective interests.<sup>7</sup> The effect that the condemnation proceeding has upon the landlord-tenant relationship and the tenant's corresponding obligations under it, will have a very direct bearing upon the amount of compensation that the parties will receive for the taking of the property in which both are interested. The measure of compensation for the tenant's interest where the landlord-tenant relationship is extinguished in all or part of the property taken, is the reasonable market value of the unexpired term of the lease.<sup>8</sup> Of course, this is not easy to estimate.<sup>9</sup>

The practical objection to the view that a taking of part of the leased premises does not affect the obligations under the lease, an objection which is applicable with even greater force to the view that a taking of the whole of the leased premises does not affect such liability, is that, while it results in giving the tenant a part of the damages for the taking of the premises, on the theory that he will continue to pay rent to the landlord, it furnishes no security excepting the personal obligation of the tenant to pay. The result may be that the tenant, having gotten the fund, part or all of which equitably belongs to the landlord, as representing future rent payments, may spend it for another purpose, and if the tenant is pecuniarily irresponsible, the landlord is without any possible remedy.<sup>10</sup> It has been suggested, where either a part or the whole of the leased premises is taken under eminent domain, that the rent should be either proportionately reduced or extinguished for the reason that the leasehold interest in the land taken has come to an end by reason of its merger in the reversion.<sup>11</sup> If this suggestion were followed, then the danger of the landlord losing money which equitably belongs to him by future insolvency of the tenant, would be eliminated.

However, condemnation of the whole or a part of the leased premises under the power of eminent domain, and ouster of the tenant as a result thereof, does not amount to a breach of a covenant in the lease for quiet enjoyment, for the landlord is in no way at fault in such a taking, so the courts have not compared this with an eviction either by the landlord, or by one having a paramount title.<sup>12</sup> It is desirable from the position of the landlord and the tenant to attempt to provide in advance for this contingency so that, so far as

7. *Biddle v. Hussman*, 23 Mo. 597 (1856); *Ellis v. Welch*, 6 Mass. 250 (1810).

8. *Kohl v. United States*, 91 U. S. 367 (1875); *Biddle v. Hussman*, 23 Mo. 597 (1856).

9. See *St. Louis v. Senter Commission Co.*, 108 S. W. (2d) 1070 (Mo. App. 1937), noted in (1938) 3 Mo. L. REV. 203.

10. 2 *TIFFANY, LANDLORD AND TENANT* (1910) 1185. It was suggested in the case of *Stubbins v. Evanston*, 136 Ill. 37, 26 N. E. 577 (1891), that a court of equity might interpose and appropriate enough of the funds to pay the rents due and to become due for the duration of the term. But this may be doubtful even on a showing of insolvency. Moreover, such proceeding could not determine the continued solvency or insolvency of the tenant during the whole period of the lease. *Ibid.*

11. 2 *TIFFANY, loc. cit. supra* note 10.

12. *Goodyear Shoe Machinery Co. v. Boston Terminal Co.*, 176 Mass. 115, 95 N. E. 214 (1900); *Frost v. Earnest*, 4 Whart. 86 (Pa. 1839).

possible, this situation may be cared for according to their wishes, which may not coincide with the result under law in the absence of an express arrangement.

*Condemnation Because Unsafe or Unsanitary*

Condemnation of the leased premises because of unsafe or unsanitary conditions does not terminate the landlord-tenant relationship, the tenant's obligation to pay rent continues,<sup>13</sup> and the tenant is not entitled to recover damages for an eviction. For the tenant to terminate the relationship, outside of a taking by the public, there must be some fault on the part of the landlord. The tenant must either be actually put off of the premises or the landlord must in some manner substantially interfere with the tenant's beneficial enjoyment of the premises so as to constitute a constructive eviction, which the tenant could take advantage of by moving off.<sup>14</sup> However, if the lease by its express terms imposes a duty on the landlord to comply with safety and sanitary regulations, such failure may constitute a constructive eviction, thus relieving the tenant of further obligations to pay rent.<sup>15</sup> Of course, before a tenant can take advantage of an act of the landlord as constituting a constructive eviction he must first move off of the leased premises. It would be simpler to provide expressly for this event.

*Requisition of Use by the Government*

Requisition of the use of the premises by the government does not affect the landlord-tenant relationship or the tenant's obligation to pay rent, and the tenant can recover the market value of his tenancy from the government.<sup>16</sup> The constitutional grounds for recovery are well stated in *Filbin Corp. v. United States*,<sup>17</sup> where the court said: "The language of the Fifth Amendment to the Constitution of the United States is: 'Nor shall private property be taken for public use without just compensation.' Nothing is said about 'requisition' or 'condemnation;' the word used is 'taken.' The result of either condemnation or requisition is a taking, and therefore, . . . this amendment applies to the taking of private property, whether it be by requisition or by condemnation;" Just compensation guaranteed by the Constitution has been held to be the fair market value of the property taken.<sup>18</sup> Not infrequently, however, there is difficulty, because of the character of the property taken, whether realty or

13. *Manley v. Bermen*, 60 Misc. 91, 111 N. Y. Supp. 711 (Sup. Ct. 1908); *Achlers v. Rehlinger*, 1 City Ct. R. 79 (N. Y. 1878); *Burns v. Fuchs*, 28 Mo. App. 279 (1887).

14. *Fleming v. King*, 100 Ga. 449, 28 S. E. 239 (1897).

15. *New Chester Theatre Corp. v. Bischoff*, 210 App. Div. 125, 205 N. Y. Supp. 641 (2d Dep't 1924).

16. *Gerston Bros. Co. v. United States*, 284 Fed. 849 (C. C. A. 5th, 1922).

17. 266 Fed. 911 (E. D. S. C. 1920).

18. *National City Bank v. United States*, 275 Fed. 855 (S. D. N. Y. 1921), *aff'd*, 281 Fed. 754 (C. C. A. 2d, 1922); *United States v. New River Collieries Co.*, 276 Fed. 880 (C. C. A. 5th, 1921); *C. G. Blake Co. v. United States*, 275 Fed. 861 (S. D. Ohio 1921), *aff'd*, 279 Fed. 71 (C. C. A. 6th, 1922).

personalty, to determine the fair market value.<sup>19</sup> If a building is requisitioned, the tenant is not entitled to recover, as part of his compensation, moving expenses or allowances for inconvenience incident thereto,<sup>20</sup> and no allowance is made as part of the "just compensation," for anticipated profits from the performance of a contract,<sup>21</sup> but the term has been held to include interest from the date of the taking where the United States condemns and takes possession of land before ascertaining or paying compensation.<sup>22</sup> But the same objections apply here as in condemnation, where the relationship is not terminated, and which the parties may easily eliminate by express provision.

### *Restrictions of Use by the Police Power of the State*

If the use restricted by the police power of the state is not the exclusive purpose of the lease, so that the tenant may have some beneficial enjoyment of the premises, notwithstanding one of its uses has been restricted, the courts are almost unanimous in holding that such a restriction has no effect on the landlord-tenant relationship and that the tenant is still liable for the rent.<sup>23</sup> If the lease restricts the use of the premises to an exclusive purpose (the liquor business, for example), and that particular use is restricted by the police power of the state, there is a conflict as to what effect this has on the landlord-tenant relationship and the tenant's obligation to pay rent. The view adopted by a court depends on which of two fundamental principles the court adopts. One theory is that if the performance of a contract is made unlawful after the contract is entered into, it becomes void and both parties are relieved from liability under it. Following this principle the landlord-tenant relationship is terminated and the tenant is relieved from liability, when the use of the premises is made unlawful.<sup>24</sup> The other theory is that, in the absence of a covenant in the lease relieving the tenant from liability, his liability continues even though the property becomes useless by a casualty over which he had no

19. *United States v. New River Collieries Co.*, 276 Fed. 690 (C. C. A. 3rd, 1921).

20. *Gershon Bros. Co. v. United States*, 284 Fed. 849 (C. C. A. 5th, 1921).

21. *De Laval Steam Turbine Co. v. United States*, 284 U. S. 61 (1931).

22. *Seaboard Air Line Co. v. United States*, 261 U. S. 299 (1923).

23. *In re Bradley*, 255 Fed. 307 (N. D. Ala. 1915); *O'Byrne v. Henley*, 161 Ala. 620, 50 So. 83 (1909); *Harper v. Young*, 123 Ark. 162, 184 S. W. 447 (1916); *Burke v. San Francisco Breweries*, 21 Cal. App. 198, 131 Pac. 83 (1913); *Security Trust & Sav. Bank v. Claussen*, 44 Cal. App. 735, 187 Pac. 140 (1919); *Christopher v. Charles Blum Co.*, 78 Fla. 240, 82 So. 765 (1919); *Shreveport Ice & Brewing Co. v. Mandel Bros.*, 128 La. 314, 54 So. 831 (1911); *Standard Brewing Co. v. Weil*, 129 Md. 487, 99 Atl. 661 (1916); *Robbins v. McCabe*, 239 Mass. 275, 131 N. E. 799 (1921); *Hyatt v. Grand Rapids Brewing Co.*, 168 Mich. 360, 134 N. W. 22 (1912); *Proprietors Realty Co. v. Wohltmann*, 95 N. J. L. 303, 112 Atl. 410 (1921); *Miller v. Maguire*, 18 R. I. 770, 30 Atl. 966 (1894); *Houston Ice & Brewing Co. v. Keenan*, 99 Tex. 79, 88 S. W. 197 (1905); *Warm Springs Co. v. Salt Lake City*, 50 Utah 58, 165 Pac. 788 (1917); *Hecht v. Acme Coal Co.*, 19 Wyo. 18, 113 Pac. 788 (1911); *Yesler Estate v. Continental Distributing Co.*, 99 Wash. 480, 169 Pac. 967 (1918).

24. *Greil Bros. Co. v. Mabson*, 179 Ala. 444, 60 So. 876 (1912); *Kahn v. Wilhelm*, 118 Ark. 239, 177 S. W. 403 (1915); *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69, 113 S. W. 364 (1908).

control. Following this principle the landlord-tenant relationship and the tenant's liability for the rent would not be affected by a restriction of the sole use of the premises by governmental authority. It has been suggested that the former rule should control because, at the time rules governing the landlord-tenant relationship were formulated, social conditions were such that the right of the tenant received less consideration than those of the landlord, and that fairness would favor leaning toward the rule which would relieve the tenant from a situation which he had entered in good faith, when, by reason of change of laws, the loss must fall somewhere, and there is nothing to suggest why the landlord should not bear a portion of it.<sup>25</sup> This reasoning overlooks the fact that the essential part of a lease is a conveyance of an interest in land.<sup>26</sup> The tenant still has this interest in the land which was conveyed to him by the lease, even though the only use for which the land could be used has been restricted, so it seems that on principles of property law the latter rule should control. This is another matter which a little foresight in drafting could easily care for.

#### *Alterations and Improvements Ordered*

A failure by the landlord to make alterations or repairs required by the public authorities does not constitute a constructive eviction, where the landlord is under no duty to make the alterations or repairs because the landlord is in no way at fault.<sup>27</sup> Even if the landlord were under a duty to repair, failure to make repairs and alterations ordered by the authorities would not constitute constructive eviction because there is no intention to evict and the tenant could make the repairs and set it off against the rent.<sup>28</sup> Therefore, the order of repairs and improvements by the authorities does not affect the landlord-tenant relationship or the tenant's obligations to pay rent. In the absence of a covenant to repair or to bear the expense of alterations and improvements ordered by public authority, the general rule is that the landlord and not the tenant is liable for the expense of making them.<sup>29</sup> It has been suggested in such situations that the landlord should be responsible to the public authorities for the condition of structures which formed part of the property as leased, and, that the tenant should be responsible for the condition of those thereafter erected by him.<sup>30</sup> This seems to be a desirable qualification to impose on the general rule and the courts still have the opportunity to impose it, as the cases on the subject are concerning structures which formed a part of the premises when leased.

25. Note (1923) 22 A. L. R. 821.

26. 1 TIFFANY, *op. cit. supra* note 10, at 159.

27. Pratt v. Grafton Electric Co., 182 Mass. 180, 65 N. E. 63 (1902); Taylor v. Finnigan, 189 Mass. 568, 76 N. E. 203 (1905); Burns v. Fuchs, 28 Mo. App. 279 (1887).

28. Lohman v. Kansas City Southern Ry., 326 Mo. 842, 33 S. W. (2d) 118 (1930); Griffin v. Fruborn, 181 Mo. App. 203, 168 S. W. 219 (1914); Burns v. Fuchs, 28 Mo. App. 279 (1887); Note (1931) 45 U. OF MO. BULL. L. SER. 41.

29. Clark v. Gerke, 104 Md. 504, 65 Atl. 326 (1906); Lindwall v. May, 111 App. Div. 457, 97 N. Y. Supp. 821 (2d Dep't 1906); New York v. United States Trust Co., 116 App. Div. 349, 101 N. Y. Supp. 574 (1st Dep't 1906).

30. 1 TIFFANY, *op. cit. supra* note 10, at 620.

A covenant to repair does not oblige the tenant to comply, at his own expense, with the municipal orders and regulations relating to the alterations and improvements of a structural nature.<sup>31</sup> However, if the surrounding circumstances, coupled with a covenant on the part of the tenant to repair, tend to show it was the intention of the parties that the expense of making of substantial alterations was to be borne by the tenant, then the tenant will be liable for the expense of alterations and improvements ordered by public authorities.<sup>32</sup> Under a covenant to repair, the tenant would be liable for repairs and improvements, not of a structural nature, ordered by governmental authority.<sup>33</sup> Obviously, a tenant covenanting to repair must bear the expense of alterations or improvements ordered by public authority when the requirement is due to some particular use the tenant is making of the premises.<sup>34</sup>

Under a covenant by the tenant to comply with the requirements of the public authorities, the landlord and not the tenant is responsible for alterations and improvements of a structural nature required by the order of a public authority.<sup>35</sup> Such a covenant, however, does render the tenant liable for incidental repairs and replacements which may be ordered by the public authorities,<sup>36</sup> and also for any alterations or improvements required by the authorities because of the use the tenant is making of the premises.<sup>37</sup> But the tenant is released from liability under a covenant to repair or a covenant to comply with the requirements of public authorities where the changes ordered are a change in municipal policy subsequent to the lease.<sup>38</sup>

These are the more common methods by which governmental regulations may affect the landlord-tenant relationship. Foresight and careful drafting

31. *Getty v. Fitch*, 107 Misc. 404, 177 N. Y. Supp. 691 (N. Y. City Cts. 1919); *New York v. United States Trust Co.*, 116 App. Div. 349, 101 N. Y. Supp. 574 (1st Dep't. 1906); *Lindwall v. May*, 111 App. Div. 457, 97 N. Y. Supp. 821 (2d Dep't 1906); *Contant v. Snow*, 201 Mo. 527, 100 S. W. 5 (1907); *Yall v. Snow*, 201 Mo. 511, 100 S. W. 1 (1906); *Zeibig v. Pfeiffer Chemical Co.*, 150 Mo. App. 482, 131 S. W. 131 (1910).

32. *Baker v. Horan*, 227 Mass. 415, 116 N. E. 808 (1917); *Martinez v. Thompson*, 80 Tex. 568, 16 S. W. 334 (1891); *McManamon v. Tobiason*, 75 Wash. 46, 134 Pac. 524 (1913); *Note* (1924) 33 A. L. R. 530.

33. *Harder Realty & Const. Co. v. Lee*, 74 Misc. 436, 132 N. Y. Supp. 447 (Sup. Ct. 1911); *Clarke v. Yukon Inv. Co.*, 83 Wash. 485, 145 Pac. 624 (1915).

34. *Lumiansky v. Tessier*, 213 Mass. 182, 99 N. E. 1051 (1912); *Johnson v. Snow*, 102 Mo. App. 233, 76 S. W. 675 (1903), *rev'd on other grounds in* 201 Mo. 450, 100 S. W. 5 (1907); *Pross v. Excelsior Cleaning & Dyeing Co.*, 110 Misc. 195, 179 N. Y. Supp. 176 (N. Y. City Cts. 1920).

35. *Zeibig v. Pfeiffer Chemical Co.*, 150 Mo. App. 482, 131 S. W. 131 (1910). *Holden v. O'Brien*, 204 N. Y. Supp. 340 (Sup. Ct. 1924); *Morrissey v. Rhinelander Real Estate Co.*, 158 App. Div. 533, 143 N. Y. Supp. 826 (1st Dep't 1913); *Clarke v. Yukon Inv. Co.*, 83 Wash. 485, 145 Pac. 624 (1915).

36. *Des Moines Steel Co. v. Hawkeye Amusement Co.*, 187 Iowa 940, 174 N. W. 703 (1919); *Markham v. Stevenson Brewing Co.*, 104 App. Div. 420, 93 N. Y. Supp. 684 (1st Dep't 1905).

37. *Blauner v. Siegel*, 85 Misc. 398, 147 N. Y. Supp. 435 (Sup. Ct. 1914); *Federal Estates Corp. v. Lucca Restaurant Co.*, 184 N. Y. Supp. 679 (Sup. Ct. 1920); *Clarke v. Yukon Inv. Co.*, 83 Wash. 485, 145 Pac. 624 (1915).

38. *Johnson v. Snow*, 102 Mo. App. 233, 76 S. W. 675 (1903), *rev'd on other grounds in* 201 Mo. 450, 100 S. W. 5 (1907); *Herald Square Realty Co. v. Saks & Co.*, 215 N. Y. 427, 109 N. E. 545 (1915); *Blanchard Co. v. Rome Metalic Bedstead Co.*, 184 App. Div. 187, 171 N. Y. Supp. 890 (1st Dep't 1918).

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of provisions in the lease to care for these possibilities are necessary adequately to protect the parties. This is one place in the law where the whole approach in entering into the relationship should be of a preventive character. This is due to the historical aspect of the relationship which results in two or more persons being interested in the same land at the same time, yet not in the form of co-ownership. Had the relationship a basis in contract, perhaps more attention would have been paid to drafting.

HARRY H. BOCK